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## **LOSS OF USE DAMAGES UNDER U.S. MARITIME LAW - A PRIMER**

### **Introduction**

Loss of use damages, also known as lost profits, loss of earnings or hire, or detention damages, form an integral part of a vessel owner's recovery in circumstances where a vessel is out of service due to damage sustained in a collision or allision. This form of damages is intended to compensate a vessel owner for the pecuniary loss it sustains while a vessel is out of service. A determination of the extent of loss of use damages is typically fact intensive and case specific so there are only a few general rules to guide a court on how to measure the quantum of a loss of use claim.

This article is intended to provide a primer on loss of use damages under U.S. maritime law based on our experience and the reported cases dealing with these issues. It addresses the most common types of issues that arise, including whether loss of use damages are available to a vessel owner and, if so, how those damages are measured. It is not intended to cover the variety of issues that could arise.

Our desire is to provide a concise guide to consult when these issues arise either in the context of claims handling or litigation that may ensue.

### **I. Loss of Use - Generally**

- a. When a vessel is detained for repairs after a collision or allision, the vessel owner is entitled to damages for loss of use of the vessel during the period of repairs. *The CONQUEROR*, 166 U.S. 125 (1897); *Bouchard Transportation Co. v. The Tug Ocean Prince*, 691 F.2d 609 (2d Cir. 1982). The courts have "wide discretion" in determining the measure of loss of use damages. *Brooklyn E. Dist. Terminal v. United States*, 287 U.S. 170 (1932); *Turecamo Maritime, Inc. v. Weeks Dredge No. 516*, 872 F. Supp. 1215 (S.D.N.Y. 1994).
- b. Loss of use damages are not awarded for vessels that are actual or constructive total losses. *The UMBRIA*, 166 U.S. 404 (1897); *F.C. Wheat Mar. Corp. v. United States*, 2010 U.S. Dist. LEXIS 37861 (E.D. Va. Apr. 16, 2010). However, a vessel owner may arguably recover loss of use damages for the period of time between the casualty and a determination that the vessel is a total loss. See CHARLES M. DAVIS, MARITIME LAW DESKBOOK 105-06 (Compass Publ'g Co. 2005).
- c. Loss of use claims require proof of actual pecuniary loss and must not be speculative. *The CONQUEROR*, 166 U.S. 110 (1897). For example, such claims are not permitted for new ventures where there is no substantive criterion for measuring profits. *Prudential Lines Inc. v. McAllister Bros. Inc.*, 801 F.2d 616 (2d Cir. 1986).
- d. Although the losses must not be speculative, a vessel owner need not prove that it lost a

charter in order to claim loss of use damages. *The JAMES McWILLIAMS*, 42 F.2d 130 (2d Cir. 1930). All that the vessel owner need prove is that they were engaged in an active market before and after the repairs. *In re M/V NICOLE TRAHAN*, 10 F.3d 1190 (5th Cir. 1994); *Maritrans Operating Partners, LP v. Port of Pascagoula*, 73 Fed. Appx. 733 (5th Cir. 2003).

## **II. Loss of Use – Measure of the Loss**

- a. Where the collision or allision results in the cancellation of a charter, or prevents the vessel owner from accepting a charter that was in negotiation, a court will look at the rate of that charter to determine the damages for loss of use. *The GLYFE v. The TRUJILLO*, 209 F.2d 386 (2d Cir. 1954); *In re Complaint of Potomac Transport, Inc.*, 1992 U.S. Dist. LEXIS 862 (S.D.N.Y. 1992).
- b. On the other hand, where there is no specific lost charter, there is no hard-and-fast rule on how loss of use damages are determined. Historically, one common approach has been the three-voyage rule, wherein the court measures damages by averaging the daily earnings of the casualty voyage with the earnings of the voyages immediately preceding and following the casualty. *Moore-McCormack Lines v. The ESSO-CAMDEN*, 244 F.2d 198 (2d Cir. 1957); *Cape Bille Shipping Co., Ltd. v. Tug Judy Moran*, 2007 U.S. Dist. LEXIS 74671 (S.D.N.Y. 2007) (using modified three-voyage rule to measure a vessel owner's loss of use damages).
- c. The three-voyage rule is only one of several ways to calculate a reasonable estimate of the loss and is not strictly applied where there are more accurate ways to measure the loss. *In re Complaint of Potomac Transport* (determining damages by calculating revenue the vessel would have earned on the last voyage less any expenses saved by not having made the voyage); *The CONQUEROR* (using average daily earnings); *Moore-McCormack Lines v. The ESSO-CAMDEN* (using comparable earnings of direct competitors to value loss of use damages).
- d. When one of the three voyages do not fairly represent normal average earnings, they are not included in the calculation. *The GLYFE* (declining to apply the three-voyage rule where there was rapidly declining market for the vessel); *Kim Crest v. M/V SVERDLOVSK*, 753 F. Supp. 642 (S.D. Tx. 1990) (same).

## **III. Loss of Use – Quantum of the Loss**

- a. The quantum of loss of use damages is net profit, which is the gross amount that the vessel would have earned during the period of time that it was out of service less the costs of operating it. *Baker Hughes Oilfield Operations, Inc. v. Seabulk Tankers, Inc.*, 2004 U.S. Dist. LEXIS 10612 (E.D. La. June 9, 2004). Thus, fuel, wages, food, and other expenses that would have been incurred in operating the vessel, but were saved as of a result of the vessel being out of service, must be deducted from the estimated lost revenues. *Id.*
- b. Where the vessel maintains its crew during the detention period, however, no deduction is made for that expense. *Skou v. United States*, 478 F.2d 343 (5th Cir. 1973), *modified*, 526 F.2d 293 (5th Cir. 1976).
- c. Fixed costs, such as the depreciation of the vessel and general maintenance, likewise do not affect net lost earnings. *Kim Crest*.

- d. When determining the quantum of the loss, courts will also consider the reasonable period of detention and the expected utilization of the vessel were it not for the casualty. *Tidewater Marine v. Sanco Int'l, Inc.*, 113 F. Supp. 2d 987 (E.D. La. 2000). The reasonable period of detention includes the time necessary to transport the damaged vessel from the scene of the casualty to the repair yard. See *In re MNM Boats, Inc.*, 2009 U.S. Dist. LEXIS 119861 (E.D. La. 2009) (including period transporting damaged vessel to dry-dock when calculating detention period); *Cape Bille Shipping Co., Ltd. v. Tug Judy Moran*, 2007 U.S. Dist. LEXIS 74671 (S.D.N.Y. 2007) (same).
- e. Utilization of the vessel is the estimated percentage of time that the vessel would have worked during the period it was out of service. *Tidewater Marine v. Sanco Int'l, Inc.*, 113 F. Supp. 2d 987 (E.D. La. 2000). Utilization need not be proven with exact precision but evidence of relevant market activity and historical utilization of the vessel is used by courts in analyzing this factor. *Id.* Time spent by a vessel sailing in ballast towards the loading port on a new charter after repairs is not considered "idle" time for purposes of loss of use damages. *In re M/V Nicole Trahan*, 10 F.3d 1190 (5th Cir. 1994).
- f. A vessel owner with a fleet of vessels is required to demonstrate that its fleet was fully utilized and another of its vessels could not have performed the work of the damaged vessel without a loss in productivity. *Dow Chem. Co. v. M/V Roberta Tabor*, 815 F.2d 1037 (5th Cir. 1987).
- g. A vessel owner cannot recover loss of use damages for any time beyond that which the repairs could "reasonably" have been completed. *Port Ship Serv., Inc. v. MT Warren B*, 2001 AMC 1266 (E.D. La. 2000).
- h. No loss of use damages can be recovered where the vessel had been previously scheduled to undergo ordinary maintenance and repairs and the collision/allision repairs did not cause any additional downtime during that lay-up. See *Bouchard Transp. Co. v. The Tug "Ocean Prince"*, 691 F.2d 609 (2d Cir. 1982) and *Compania Pelineon de Navegacion, S. A. v. Texas Petroleum Co.*, 540 F.2d 53 (2d Cir. 1976).
- i. However, a vessel owner is not required to delay repairs of the casualty damage until a scheduled lay-up so long as they were reasonably apprehensive as to the vessel's seaworthiness. *Mon River Towing, Inc. v. Indus. Terminal and Salvage Co.*, 2010 U.S. Dist. LEXIS 31227 (W.D. Pa. Mar. 31, 2010).

#### **IV. Loss of Use - Time and Voyage Charterers**

- a. Time and voyage charters are not entitled to damages for lost profits anticipated from their use of the chartered vessel. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); see also *In re Moran Enters. Corp.*, 77 F. Supp. 2d 334 (E.D.N.Y. 1999).
- b. However, a time charterer that is obligated to pay hire while the vessel is out of service may be subrogated to the owner's claim for loss of use. *Venore Transport Co. v. The Struma*, 583 F.2d 708 (4th Cir. 1978); *Standard Navigazione S.p.A. v. K.Z. Micholos*, 1981 AMC 748 (S.D. Tex. 1981).
- c. In contrast, bareboat and demise charters (which hold a property interest in the vessel) can recover loss of use damages. *Bosnor S/A v. L. A. Barrios*, 796 F.2d 776 (5th Cir. 1986).

**V. Loss of Use - Tug & Barge Operations**

Where a tug and barge operate as an integrated unit, loss of use of the tug may be recovered for the period of time that the barge is being repaired. *Domar Ocean Trans. Ltd. v. M/V Andrew Martin*, 754 F.2d 616 (5th Cir. 1987).

**VI. Loss of Use - Fishing Vessels**

- a. Fishing vessel operators can recover loss of use damages, which are measured by the catches of similar vessels on the same fishing grounds during the detention period. *Yarmouth Sea Prods. Ltd. v. Scully*, 131 F.3d 389 (4th Cir. 1997).
- b. There is a split of legal authority regarding whether lost crew shares are recoverable. Compare *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813 (5th Cir. 1984) (permitting recovery of loss of crew shares), and *Carbone v. Ursich*, 209 F.2d 178 (9th Cir. 1953), with *Boat Dianne Lynn, Inc.*, 729 F. Supp. 1400 (D. Me. 1989) (interpreting *Robins Dry Dock* to prohibit recovery of lost fishing profits where crew members did not have an ownership interest in vessel).
- c. In jurisdictions where lost crew shares are recoverable, the fishing vessel owner or Master may recover them on the crew's behalf as trustee. *Reefer Queen Co. Inc. v. Marine Construction and Design Co.*, 1969 AMC 677 (Wash. Sup. Ct. 1968). In order to recover however, the crew members must have a somewhat permanent connection to the vessel during the relevant period. *Jet Boats, Inc. v. Puget Sound Bank*, 44 Wn. App. 32 (1986).

**VII. Loss of Use - Pleasure Vessels**

- a. Loss of use damages are not recoverable by the owner of a pleasure vessel where there is no pecuniary loss. *THE CONQUEROR*, 166 U.S. 110 (1897). The mere inconvenience of not being able to use one's yacht is not compensable.
- b. However, reasonable costs to charter a replacement pleasure vessel are arguably recoverable where necessary for planned recreation. See CHARLES M. DAVIS, MARITIME LAW DESKBOOK 107 (Compass Publ'g Co. 2005).
- c. Further, there is authority standing for the proposition that loss of use damages are permitted where a pleasure vessel also acts as a plaintiff's home. *Oswalt v. Resolute Indus., Inc.*, 2010 U.S. Dist. LEXIS 22218 (W.D. Wash. Mar. 10, 2010); *Staples v. H & A Trading, Inc.*, 1994 AMC 1729 (D.P.R. 1993).

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